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In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUISIANA DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA, in personam, and HOUSTON GENERAL INSURANCE CO.,

Defendants-Petitioners

versus

WINNIE OLA CRADOR AS EXECUTRIX OF THE ESTATE OF HURBY CRADOR, ETC.,

Plaintiff-Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER, IN VIEW OF THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE FEDERAL COURTS HAVE JURISDICTION OVER THE STATE OF LOUISIANA IN A CLAIM BROUGHT UNDER THE JONES ACT AND GENERAL MARITIME LAW.

2. WHETHER AN ALLEGED JONES ACT SEAMAN-STATE EMPLOYEE MAY MAINTAIN AN ACTION AGAINST THE STATE OF LOUISIANA IN THE FEDERAL COURTS ABSENT AN EXPRESSED WAIVER BY THE STATE OF ITS ELEVENTH AMENDMENT IMMUNITY.

3. WHETHER CRADOR'S SOLE REMEDY AGAINST THE STATE OF LOUISIANA AND ITS INSURER LIES IN THE LOUISIANA STATE COURT.

4. WHETHER THE LOWER COURTS ABUSED THEIR DISCRETION AND/OR ERRED IN REFUSING TO PERMIT INTRODUCTION OF CRADOR'S WORK HISTORY FOR THE JURY'S DETERMINATION OF SEAMAN STATUS.

5. WHETHER AN INDIVIDUAL WHO PERFORMS 94% OF THE TIME OF HIS EMPLOYMENT IN LAND-BASED ACTIVITIES IS A JONES ACT SEAMAN.

6. WHETHER CRADOR WAS A JONES ACT SEAMAN IN FACE AND IN LAW AND ENTITLED TO ASSERT A CLAIM UNDER THE JONES ACT AND/OR GENERAL MARITIME LAW OR WAS CRADOR'S EXCLUSIVE REMEDY UNDER THE LOUISIANA WORKMEN'S COMPENSATION ACT, L.S.A. - R.S. 23:1034, ET SEQ.

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PRAYER

Petitioners pray for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court entered on September 18, 1980.

OPINIONS BELOW

The judgment of the court below (Appendix A) is reported at 625 F.2d 1227 (5th Cir. 1980), rehearing en banc denied, 632 F.2d 894 (5th Cir. 1980) (Appendix B). The opinions of the district court (Appendixes

GROUNDS FOR JURISDICTION

Petitioners, Louisiana Department of Highways, State of Louisiana, and Houston General Insurance Company pray that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on the

18th day of September, 1980 in the matter reported at 625 F.2d 1227 (5th Cir. 1980) (Appendix A).

Jurisdiction of this Court is invoked pursuant to Title 28, Section 1254, Paragraph 1, United States Code. (See Appendix K).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Jones Act, 46 U.S.C. §688 (Appendix J); 28 U.S.C. §1254 (1) (Appendix K); Louisiana Constitution Article XII §10 (1974) (Appendix L); LSA-R.S. 13:5101-2, 5105-6 (Appendix M).

EXISTENCE OF PROPER JURISDICTION BELOW

Petitioners seek review of the judgments of the United States Court of Appeals and District Court on the basis there was no jurisdiction below.

STATEMENT OF THE CASE

A. Course of proceedings.

Hurby Crador, an Auto Mechanic II, employed by the Louisiana Department of Highways, State of Louisiana (hereinafter referred to as "Highway Department"), filed this suit claiming damages against the Highway Department, as his em-

ployer and as owner and operator of the GRAND LAKE FERRY, under the Jones Act, 46 U.S.C.A. §688, and the General Maritime Law, for negligence and unseaworthiness. Additionally, Crador sued Houston General Insurance Company, the liability insurer of the Highway Department.

The Highway Department and Houston General (hereinafter jointly referred to as "Petitioners") filed an Answer and an Amended Answer denying that they were negligent or the vessel unseaworthy and further denied that Crador had the requisite "status" to sue under the Jones Act or the General Maritime Law.

Petitioners filed a Motion to Dismiss and/or for Summary Judgment on the grounds that plaintiff lacked "seaman" status to sue under the Jones Act adn the General Maritime Law. Argument on the Motion was heard by District Judge Edwin F. Hunter, Jr., who initially granted petitioners' Motion, upon oral argument; however, Judge Hunter granted a rehearing to Crador. On rehearing, Judge Hunter denied petitioners' Motion even though he was of the opinion that Crador "wasn't a member of the crew of that vessel [GRAND LAKE FERRY] in the terms that he was permanently assigned to it." Judge Hunter made the observation that "the issue in this case is whether or not there is sufficient evidence in this case that a jury could determine as a *factual situation* that this man was a member of a crew of a *vessel* or *vessels.*" (emphasis added). Petitioners assert that it is important that the reasoning for Judge Hunter's denial of petitioners' Motion be set out with the following portion:

> It really does not matter too much in the final analysis whether Crador is a seaman or not. This is so because under the rule of *Smith v. M/V Captain Fred,* 546 F.2d 119 (5th Cir. 1977) a repairman aboard a vessel may sue the vessel on which he was injured for both its negligence and unseaworthiness, when as here the owner of the vessel is also against the Department of Highways if he was injured as a result of the ferry's negligence and/or unseaworthiness. (Appendix F).

Judge Hunter's reliance upon the court's decision in *Smith v. M/V Captain Fred,* 545 F.2d 119 (5th Cir. 1977), was misplaced in denying petitioners' Motion. Petitioners brought to the attention of the Court that a definitive ruling on status would answer questions as to right to trial by jury, right to a claim for maritime tort or unseaworthiness, different concepts of negligence under *Smith v. M/V Captain Fred, supra,* and maritime negligence, etc. However, in response to petitioners' Motion for Rehearing, Judge Hunter again took the position that, although the "ultimate material facts regarding Crador's status are not in serious dispute", regardless of the Jones Act status, "Crador would have a cause of action against the Highway Department if the ferry was negligent or if there was unseaworthiness." Petitioners filed a Supplemental Memorandum in Support of its Motion to Dismiss and/or for Summary Judgment; however, again the Motion of petitioners on the issue of status was denied. (Appendix G).

The case was set down for trial with a jury before Judge

Earl E. Veron, who had replaced Judge Hunter on November 14, 1977. The jury trial was bifurcated to determine the issue of seaman status prior to and apart from the issue of liability and damages. The case was submitted to the jury on the issue of status and a verdict was returned in favor of Crador. The trial continued immediately on the issue of liability and damages. The case was submitted to the jury on the issue of unseaworthiness, negligence and contributory negligence and a verdict was returned in favor of Crador in the amount of $250,000.00 The lower court thereafter, on November 17, 1977, entered judgment in favor of Crador and against petitioners in the amount of $250,000.00 (Appendix C). Said judgment was amended by Judge Veron on November 31, 1977, to limit the liability of Houston General to the remaining amount of its $100,000.00 policy limits of $86,737.34, for which amount Houston General and the Highway Department were held to be liable in solido, with the Highway Department remaining solely liable for the remainder of the $250,000.00 judgment (Appendix D).

On December 7, 1977, petitioners timely filed their post-trial Motions for Judgment N.O.V., Partial Judgment N.O.V., New Trial, Partial New Trial and Remittitur, which Motions were presented before Judge Veron and denied. Petitioners timely filed an appeal to the Court of Appeals.

Oral argument was presented to the Fifth Circuit panel consisting of Circuit Judges John R. Brown, Walter P. Gewin and Henry A. Politz. Follwing oral argument, the panel affirmed

the rulings and judgment of the lower court in all respects, 625 F.2d 1227 (5th Cir. 1980) (Appendix A). Follwoing the opinion of the Fifth Circuit panel, petitioners timely filed a Petition for Rehearing En Banc, which Petition was denied on November 3, 1980, 632 F.2d 894 (5th Cir. 1980) (Appendix B). Petitioners thereafter filed this timely Petition for Certiorari.

B. Relevant Facts.

On May 21, 1975, the date of plaintiff's alleged accident, defendant-petitioner, Highway Department, was the owner and operator of the GRAND LAKE FERRY, which vessel had been in use from May 9, 1975 through August, 1975, a temporary replacement for a permanent bridge which was then undergoing repairs. On the said date, Crador was employed by the Highway Department in the capacity of Auto Mechanic II and assigned to the land-based shop of the Highway Department in Lake Charles, Louisiana. As an Auto Mechanic II, Crador was charged with a wide range of duties, including repair and maintenance of lawnmowers, road tractors, automobiles, trucks, heavy road equipment, permanent bridges and ferries. Although he ordinarily worked in the Highway Department shop, Crador was subject to be called out to perform road repairs on cars and heavy trucks. For this reason, he was provided with a state truck.

Crador had been employed by the Highway Department for more than twenty years prior to the accident in question. He had served in the capacity of Auto Mechanic I or II for more

than fifteen years. During the time he worked as an Auto Mechanic II, Crador was called upon to perform certain sporadic and isolated repair work on the engines of various ferries operated in the Lake Charles area by the Highway Department. Crador was one of several auto mechanics subject to call on the ferries as aforementioned.

Out of a total 4,160 hours worked, during the two year period preceding the accident in question, Crador worked approximately 237.5 hours, which includes credit for travel time, or approximately 5.7% of his work time, on or with ferries. The remaining 94.3% of his work time was involved with his primary land-based activities.

Crador did not eat or sleep aboard any vessel. He would drive home every night in his state truck and report to his shop for his assignment each morning. When he reported to work, Crador did not know exactly what work he would be doing on any particular day. He admits that he did not work as a deckhand or operator or engineer aboard any of the ferries. He did not tie or untie the ferry or assist in handling the automobiles.

Contrary to the allegations in the Complaint and by his own admission, Crador was not assigned to any particular ferry, but was, in fact "just a road mechanic". In fact, he refused a deckhand and operator's job. Crador did not perform any regular maintenance work aboard any vessels such as changing oil, fueling up, etc. Rather, these jobs were performed by full-time engineers assigned to larger ferries which engineers are given the title of Marine Engineer II. On the smaller ferries, such as the

GRAND LAKE FERRY, the maintenance work was performed by the crewmembers, namely, the operator and deckhand. The only time Crador was ever called out to work on a ferry was when the vessel would experience a major mechanical breakdown. If there had been no major mechanical breakdowns aboard the ferries, Crador would never have boarded them. The facts in this regard are totally set out in the testimony of Crador. Said testimony clearly establishes Crador's status as a land-based worked rather than a seaman.

REASONS FOR GRANTING OF WRIT

The questions raised in this case are of fundamental legal and constitutional proportions and are of such importance that this Court should hear arguments, and after due deliberation, grant petitioners the relief sought.

ARGUMENT

This litigation involves a lawsuit brought by Hurby Crador, an individual employed by the Department of Highways, State of Louisiana as an Auto Mechanic II. Crador was employed in a primarily land-based employment as had worked 94% of his employment with the Department of Highways in activities on land. However, at the time of his accident and injuries, he was performing certain repair work to the transmission of a ferry owned and operated by the Department of Highways.

This action was brought under the Jones Act and General Maritime Law in the United States District Court. Petitioners aver that the federal courts lack the jurisdiction over petition-

ers based upon the immunity afforded by the Eleventh Amendment of the United Stated Constitution. As such, Crador's sole remedy against the State of Louisiana and its insurer lies in the courts of the State of Louisiana and, more particularly, under the Louisiana Workmen's Compensation Statute.

Petitioners further aver that Crador was not a Jones Act seaman in fact or in law based upon his work history. As such, the federal courts lack subject matter jurisdiction over the subject litigation.

Petitioners respectfully move this honorable court to grant certiorari in the instant case and to reverse the prior decisions and judgements of the United States Fifth Circuit Court of Appeals and of the United States Dictrict Court for the Western District of Louisiana.

QUESTION NOS. 1, 2 & 3

Immunity provided by the Eleventh Amendment of the United States Constitution:

This suit is by an individual against the State of Louisiana over which the federal courts have jurisdiction only if the State of Louisiana had authorized such suit. Under the Eleventh Amendment of the United States Constitution, the federal judicial power does not extend to any suit in law, equity or admiralty against a state by citizens of another state even in cases arising under the Constitution or Laws of the United States. *In re State of New York*, 256 U. S. 490, 41 S.Ct. 588 (1921); *see also, Red Star Towing and Transportation Co. v. Dept. of Transp. of N.J.*, 423 F.2d 104 (3rd Cir. 1970).

Although the Eleventh Amendment does not by its own terms bar a citizen from sueing his own state, a state cannot be sued without its consent in a federal court by one of its own citizens. *Employees v. Department of Public Health and Welfare of Missouri,* 411 U. S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973).

In *Edelman v. Jordan,* 415 U. 651, 94 S.Ct. 1347, L.Ed. 2d 662 (1974), this Court held that a suit by private parties seeking to impose liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment. The Court cited its opinion in *Ford Motor Co. v. Department of Treasury,* 343 U.S. 459, 65 S.Ct. 347 wherein the court stated:

> [W]hen the action is in essence one for the recovery of money from a state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Under the aforesaid " real party in interest" rule, it is clear that the State of Louisiana, Department of Highways is entitled to Eleventh Amendment immunity since under Louisiana state law any judgment rendered would be payable our of funds appropriated by the State Legislature. See, Judge Edward Boyle's thorough opinion in *Usry v. Louisiana Dept. of Highways,* 459 F. Supp. 56 (E.D. La. 1978).

The State of Louisiana has waived its sovereign immunity only to a certain degree. Article XII, Section 10, of the 1974

Constitution provides:

> Neither the State, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

However, the state has expressly provided the limitation that all suits against the State, state agencies, or political subdivisions shall not be instituted in federal courts. Seciton I of Act No. 434 of 1975, LSA-R.S. 13:5106 provides:

> No suit against the state, state agency or political subdivision shall be instituted in any court other than a Louisiana State Court.

LSA-R.S. 13:5102 provides in pertinent part:

> 'State agency' means any board, commission, department, agency, special district, authority or other entity of the state.

Additionally, the State of Louisiana has expressly provided that no suits against the state, state agency or political subdivision can be tried by jury. LSA-R.S. 13:5105 (Appendix M).

Petitioners do not contend that Crador is without remedy for the injuries he sustained. Rather, it is submitted that Crador can sue his employer and its insurer only in the State Courts of Louisiana without a jury.

The Supreme Court has specifically held that consent to suit can be limited to state courts and not be applicable to actions in federal courts. *Ford Motor Co. v. Department of Treasury, supra; Great Northern Life Ins. Co. v. Read, 322 U.S. 47,*

64 S. Ct. 873, 88 L.Ed. 1121 (1944). Accordingly, without a waiver of immunity, the State of Louisiana, Department of Highways, (and its insurer) cannot be sued in federal courts. The immunity of the Department of Highways was upheld in the recent decision of the Fifth Circuit, *Dagnall v. Gegenheimer,* C.A. No. 79-1805 (5th Cir. 1980) (See Appendix H), rendered subsequent to the Fifth Circuit's denial of rehearing en banc in the instant case.

The defense of immunity is not barred even where the state enters into congressionally created federal regulatory scheme. *Employees v. Department of Public Health and Welfare of Missouri,* 44 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 251 (1973). In the aforesaid case, the Eighth Circuit rejected the argument that the state had waived its sovereign immunity defense by operating hospitals subject to the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. Certiorair was granted and the United States Supreme Court, in an opinion by Justice Douglas, affirmed the Eighth Circuit decision:

> It is not easy to infer that Congress is legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we

> cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity form suit in a federal forum. 411 U. S. at 285.

The Fifth Circuit in recognizing the Supreme Court decision in *Employees*, has recognized that the entering of an area regulated by Federal Government does not in and of itself create a waiver of the state's immunity. *See, Intracoastal Transp., Inc., v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973) wherein the Court stated:

> Apparently the crucial factor which must have weighed most heavily in the court's reasoning was the absence of any *expressed intent by Congress* to subject to the States to private suits. In face of the expressed limitations on a federal court's jurisdiction by the Eleventh Amendment, the court refused to expand the implied waiver theory or even entertain such a sensitive constitutional issue, without at least an *expressed congressional provision* which made a state amenable to suit
>
> . . .
>
> . . . It is no longer sufficient merely to show that a State has entered a federally regulared sphere of activity and that a private cause of action is created for violating the applicable

> federal provision, but in addition the private litigant must show that Congress *expressly* provided that the private remedy is applicable to the States. 482 F. 2d at 365 (emphasis added.)

Petitioners would submit that Crador has not and cannot show in the present case that "Congress expressly provided that the private remedy [of the Jones Act] is applicable to the States."

The sovereign immunity issue was not presented to the district court nor to the appeals court on the initial appeal. However, this Court has long recognized the importance of the immunity defense and permits such a defense to be raised for the first time on appeal - - even where urged for the first time before the Supreme Court itself. *Alabama v. Pugh*, 438 U.S. 78, S. Ct. 3057, 56 L. Ed. 2d 1114 (1978); *Ford Motor Co. v. Department of Treasury, supra; see also, Sosna v. Iowa*, 419 U. S. 393, 95 S. Ct. 533, 42 L. Ed. 2d 532 (1975). In *Edelman v. Jordan, supra*, the Court stated:

> [I]t has well be settled. . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court. 415 U.S. at 677-78.

QUESTION NOS. 4, 5 & 6

Crador was not a Jones Act seaman and his sole remedy lies under the Louisiana Compensation Act:

As the record would reflect, Crador was employed as an Auto Mechanic II and more than 94% of his work involved primary land-based activity. However, the district court permitted the status issue to go to the jury. Additionally, the district court withheld from the jury vital material evidence regarding Crador's work history. It is submitted that the appeals court furthur erred in affirming the lower court on the issue of status which finding goes against the weight of the evidence presented at trial and is contrary to the prior consistent decisions of the Fifth Circuit.

The lower court allowed the status question to go to the the jury, even though the facts were not disputed. Based upon the facts clearly before Judge Hunter, there was no evidentiary basis for this case to have been presented to a jury.

Judge Politz wrote the opinion for the panel which participated in the initial hearing on appeal:

> The record reveals that Crador was assigned to do the work necessary 'to keep[The GRAND LAKE FERRY] going' his duties materially contributed to the Ferry's mission. His assignment, in the context made, was permanent.

The only evidence that Crador was assigned to keep the ferry going was Crador's own testimony. With all due respect, petitioners would submit that Judge Politz's reliance upon that testimony is improper because the quoted testimony is erroneously *taken out of context.* The testimony was not offered to show Crador was charged with on going maintenance of the

vessel. Rather, his instructions were simply to perform the immediate repair work in such a fashion as to permit the ferry to remain in operation during the course of the repairs:

> Q. Okay. Now, had anyone said that they wanted that ferry to keep going all the time?
>
> A. *We had orders not to tie it up unless it was completely demolished.* I mean, it couldn't be run otherwise *keep it rolling.* (emphasis added)

In other words, Crador was told "Don't stop the ferry to fix it."

Permanent Assignment

The facts of the present case are not unlike those presented in the case of *Rotolo v. Halliburton Company*, 317 F.2d 9 5th Cir. 1963). In *Rotolo,* the alleged seaman was a welder who was fatally injured in the course of his work aboard of his employer's vessels. The decedent was assigned from time to time to perform a single repair job on a single designated vessel. The Fifth Circuit, affirming the lower court's denial of seaman's status stated:

> Here, Rotolo from time to time, was assigned to do and did a single repair job on a single designated boat. At no given time was he assigned to repair two or more boats. Rather, each of his repair job assignments was always directed to a single repair job on a single boat.

> *While he was assigned to repair different boats, he was not at any time charge with the duty of keeping two or more specific boats in repair.* Nor was he ever charged with the duty of keeping a single boat in repair . . .
>
> In short, at no time was Rotolo permanently assigned to or connected with a specific boat, or two or more specified boats. And Rotolo did not do a substantial part of his work on a specified boat, or two or more specified boats. And the relation of the repairs which he performed on a boat, if any, to the functioning of the boat, or accomplishment of its mission, was extremely tenuous. *It was substantially different from day-to-day maintenance of a particular boat or boats.* (emphasis added) 317 F. 2d at 13.

The Rotolo case is indistinguishable from the present action. Petitioners would submit that Crador, from time to time, did a *single mechanical repair* job on a single designated vessel belonging to the Highway Department. Each of Crador's jobs was always directed to a single repair job on a single boat. At no time was Crador charged with the duty of keeping two or more specified boats in repair. Rather Crador's connection with the GRAND LAKE FERRY and other Highway Department vessels resulted solely from his doing, from time to time, a single repair job on a single boat with no element of permanency. The

day-to-day maintenance of the ferry, according to Crador's testimony, was performed solely by the operator and deckhand, the crewmembers of the vessel. Crador performed solely mechanic work and never worked as an engineer, as such on any of the ferries. Mr. Crador admitted himself that he was not assigned to any particular boat but was "just a road mechanic."

Although the record would indicate that Crador did, at times, put in a number of hours working aboard the GRAND LAKE FERRY on a particular day, it is submitted that such isolated instances of substantial work aboard a vessel do not create seaman's status under the Jones Act. Such was the holding of the recent case of *Fazio v. Lykes Bros. S. S. Co., Inc.*, 567 F. 2d 301 (5th Cir. 1978), in which the Fifth Circuit affirmed the lower court decision of Judge Jack M. Gordon. Judge Gordon granted Summary Judgment in favor of the defendant on the issue of seaman status:

> The entire mode of operation on the shoregang crew establishes that their *work aboard vessels, though at times substantial,* was entirely transitory and depended on the particular need of Lykes Bros. assistance aboard ship on any given day. Accordingly, the Court finds as a matter of law that plaintiff had *no permanent connection* of any type to any vessel or group of vessels and, therefore, cannot be afforded seaman status. (emphasis added) 567 F. 2d at 303.

Perhaps the best support for petitioners' contention that Crador lacked permanent assignment to any vessel is the comment of District Judge Edwin F. Hunter, Jr., who stated: " . . . there is no question about that. I mean, the Court understands that. He wasn't a member of the crew of that vessel in the terms that he was permanently assigned to it."

Substantial Work

It is further submitted by petitioners that Crador did not perform a "substantial part of his work on a vessel."

Although it is admitted that Crador did, on occasion, sporadically work on or near ferries in the Lakes Charles area, it is respectfully submitted that in the case at bar the evidentiary basis for the finding of Jones Act jurisdiction falls short. Again, Crador spent only 5.7% of his normal working hours on or near ferries in the Lake Charles area. He was not assigned to any particular ferry, and, according to his own testimony, he did not serve as a member of the crew.

The appeals courts have in the past dealt with certain percentages in determining what is *not* considered substantial in the *Robison* analysis. For example, in the case of *Keener v. Transworld Drilling Company*, 468 F.2d (5th Cir. 1972), plaintiff was a platform worker who contended that he had spent three or four days scraping paint and painting in the engine room of the platform tender (vessel) and that this constituted a substantial part of his duties entitled him to Jones Act status. The court noted that the aforesaid four days

represented only 20 to 25% of the time Keener worked for the drilling company and denied seaman status.

In *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, the Fifth Circuit specifically noted that 15% of workman's duties aboard vessels does not comply with the substantiality test of *Robison*. Applying this standard to the present case, it is clear that Crador has likewise failed to meet the substantiality test.

At the trial of this case, on the issue of Jones Act status, Judge Veron refused to permit petitioners to question Crador or to introduce into evidence the work records of the Department of Highways for a period of two years prior to Crador's alleged accident. Instead, Judge Veron would permit only testimony and those records relative to the dates that the GRAND LAKE FERRY was in operation, i.e., May 9, 1975 through the date of Crador's accident on May 21, 1975 or a period of 12 days. Judge Veron's refusal to permit testimony or the introduction of the prior work records severely prejudiced petitioners' case and was made in contravention to the prevailing law.

Despite Judge Veron's restrictions to petitioners, Crador introduced testimony and documents of vessels other than the GRAND LAKE FERRY that he had worked on in the same 12 day period, *as well as* testimony and documents relative to his work aboard vessels *prior* to this 12 day period. Crador testified as to the work he did on the BLACK BAYOU FERRY during this 12 day period; yet, that vessel had been in the area for at least back to May 19, 1973. Also, Crador introduced testimony about his work aboard *all* of the ferries; yet, he had worked aboard many of those ferries *prior* to this 12 day period

but not during this 12 day period. Crador opened the door to this testimony but it was *closed* to petitioners.

The Fifth Circuit, affirmed the actions taken by Judge Veron in limiting the introduction of evidence of Crador's work history with the Department of Highways:

> The Court permitted evidence of Crador's work assignments during the time the GRAND LAKE FERRY was operational. This ruling is correct. One is not likely to be permanently assigned to a vessel, or even to spend a substantial amount of time on a vessel such as this ferry, unless it is in operation. The meaningful inquiry is the one permitted by the trial judge, i.e., how 'permanent' was the assignment and how much time did Crador spend on the vessel after it was put into operation.

Rather than focusing on the operational history of the *vessel*, the Court should have instead focused upon the employment history of the *individual* for purposes of determining seaman status. At trial, there was no evidence presented to show when the GRAND LAKE FERRY became operational. Rather, the evidence simply showed the date when the ferry was placed into service at the location in question - May 9, 1975. However, there was no showing of what work, if any, was performed by Crador while the said vessel was operational at the other locations.

At this point, petitioners would point out that the ferry in question is not named the "GRAND LAKE FERRY" but rather is identified by the Highway Department as "305-050". Records presently available indicate the ferry has been in

service for the Highway Department at least since December, 1973 - 1 1/2 years prior to Crador's accident. Judge Politz's "meaningful inquiry" - how much time did Crador spend on the vessel after it was put into operation - could not have been properly answered by the jury because the jury was not informed as to when the ferry was put into operation nor was the jury presented evidence as to how much time Crador spent on the vessel after it was put into operation.

Petitioners would further contend that Judge Politz's application of a "vessel operational history" test is both inconsistent and in direct conflict with the prior rule adopted in the Fifth Circuit. The settled rule in the Fifth Circuit looks to the employment history of the individual with emphasis upon the nature of that individual's duties taken as a whole. The *Longmire* decision is particularly appropriate:

> This case involves an additional complexity, however, in that Longmire was injured while actually working aboard the Tender. In *Keener* we specifically reserved the question whether a claimant's work aboard a vessel, which would otherwise be insufficient to vest him with seaman status would be 'sufficient to afford him seaman's status during the period of his occupation with the tasks aboard the tender' 468 F.2d at 731. We now answer that question in the negative. *The issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation as a whole . . .*

> It can hardly be said the Longmire's incidental activities aboard the tender - maintenance, moving supplies to and from the drilling platform, and stowing the anchor chain - were sufficient, when viewed in the context of *his entire employment as* a member of the drilling crew, to amount to performance of 'a significant part of his work aboard the ship with some degree of regularity and continuity. 610 F.2d at 3147 (emphasis added).

In *Billings v. Chevron U. S. A.*, 618 F.2d 1108 (5th Cir. 1980), the court stated:

> If the nature of *his occupation as a whole* was that of a platform worker and not a crewmember, plaintiff is not entitled to avail himself of the liberal terms of the Jones Act. 618 F.2d at 110 (emphasis added).

In line with the "employment as a whole" approach, the status cases have generally looked to an individual's principal employment duties and responsibilities rather than simply his immediate activity at the time of injury. *See, e.g., Kirk v. Land and Marine Applicators*, 555 F.2d 481 (5th Cir. 1977), *Holland v. Allied Structural Steel Co., Inc.* 539 F.2d 475 (5th Cir. 1976), and *Brown v. ITT Rayonier, Inc.*, 496 F.2d 234 (5th Cir. 1974), (in these cases the court looked at plaintiffs' "principal duties" in denying seaman status); *Billings v. Chevron*

U.S.A., supra, (the court examined plaintiff's "occupation as a whole" and "principal occupation" in denying seaman status); *Longmire v. Sea Drilling Corp., supra*, (in addition to "occupation taken as a whole" the court also looked at plaintiff's "primary responsibilities" in denying seaman status); *Thibodeaux v. J. Ray McDermott and Co.*, 276 F.2d 42 (5th Cir. 1960) (after examining plaintiff's "customary duties", seaman status was denied).

A review of Crador's employment as a whole clearly indicates his principal, primary and customary duties in the case at bar were those of a land-based mechanic. In the words of Crador himself, he was "just a road mechanic".

To effectively consider an individual's "employment as a whole", the courts have been called upon to review the term of an individual's work history in balance with the work activity being performed at the time of the accident in question. In *Keener v. Transworld Drilling Company*, 468 F.2d 729 (5th Cir. 1972), the court denied seaman status after noting "these four days [working on vessel] represent approximately 20-25% of the time Keener worked for the drilling company". 468 F.2d at 731. In *Dugas v. Pelican Construction Company, Inc.*, 481 F.2d 773 (5th Cir. 1973) the court denied status after noting that plaintiff had been employed by defendant one week before his injury and spent only one day on a vessel.

The court in *Brown v. ITT Rayonier, Inc., supra*, noted "[W]ell under 1% of [Brown's] *total time as an employee*

had been spent on the water and in the boat", 497 F.2d at 235, in its denial of seaman status.

In *Stokes v. B.T. Oilfield Services, Inc.*, 517 F.2d 1205 (5th Cir. 1980), plaintiff worked for defendant one day at sea out of 28 workdays". Based on this finding, seaman status was denied.

See also, Higgenbotham v. Mobil Oil Corp., supra, wherein the court went back two years in reviewing plaintiff's work history and found plaintiff (Nation) to be a seaman despite a temporary assignment aboard a fixed platform at the time of his demise.

Petitioners would emphatically direct the Court to its prior warning against the myopic focusing upon a small protion of an individual's work record:

> [W]ere we to treat appellee as a crewman during the three and one-half hour trip on the water, we would produce the irrational result that he was protected by workman's compensation principles throughout his employment, say for a brief period one afternoon when he was subject to the entirely different principles of the Jones Act. We do not think that such differences in the character and circumstances of employee protection should be governed by something as unimportant as an employee's precise location and duties at a given moment in the course of a single intergrated working day under one employer. *Brown v. ITT Rayonier, Inc.*, 497 at 239.

To bestow seaman status upon Crador under the rationale adopted herein by the Fifth Circuit will lead to the unmistakable conclusion that anyone who performs a service which materially contributes to a vessel's mission will automatically be deemed a seaman if those services are rendered, albeit on an isolated instance, during a time when a vessel is first placed into operation. Every engine repairman who services a vessel immediately after it is launched would be a "seaman" under this rationale. No circuit court has ever before taken such a position and petitioners would respectfully submit that it is improper for the courts to take that position in the case at bar.

It is also submitted that petitioners were prejudiced by the lower court's allowing Crador's work history testimony as to all vessels, both during and prior to the 12 day period, yet, petitioners were denied the right to same. This is certainly contrary to the established jurisprudential principles set by the Courts. By the same token, one cannot claim Jones Act status based on a review of his entire work history and another claim Jones Act status based on a review of only a segment of his employment history. This would effectively end any consistency in the legal requirements for determining Jones Act status. The only just and fair analysis that can be made is one on review of a plaintiff's entire work history.

The application of the established principles and guidelines long recognized by this court can lead to no other conclusion than Crador was not a Jones Act seaman at the time of his accident.

CONCLUSION

Petitioners respectfully pray that this Honorable Court grant the Writ of Certiorari to review the Judgment of the Fifth Circuit Court of Appeals.

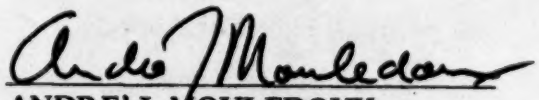
Petitioners submit that the Department of Highways did not waive its immunity provided by the Eleventh Amendment of the United States Constitution. Accordingly, the judgments of the lower courts should be reversed and the case remanded to the district court with instructions that judgment be entered in favor of petitioners dismissing Crador's suit on the basis of the Eleventh Amendment immunity.

Alternatively, petitioners submit that the judgments of the lower courts sould be reversed and the case remanded to the district court with instructions that Crador is not a Jones Act seaman as a matter of law and that judgment be entered in favor of petitioners dismissing Crador's suit.

In the further alternative, petitioners submit that the judgments of the lower courts should be reversed and the case remanded to the district court with instructions that the case be retried in order to permit the jury to review all of the relevant evidence with respect to Crador's work history.

HEBERT & ABBOTT

Respectfully submitted,



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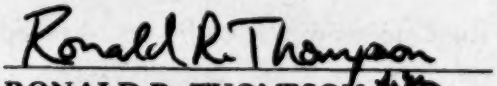

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Baton Rouge, Louisiana 70808
Attorney for Louisiana Department
of Highways, State of Louisiana,
Petitioner

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

ANDRE' J. MOULEDOUX

who declared unto me, Notary, that he is one of the attorneys for Louisiana Department of Highways, State of Louisiana and Houston General Insurance Company, defendants-petitioners herein, and a member of the Bar of the Supreme Court of the United States, and hereby certified that on the 30th day of January, 1981, he served copies of the foregoing Petition for Certiorari on plaintiff-respondent through her attorney of record and on the Clerk of Court, United States Court of Appeals for the Fifth Circuit, by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows:

MR. BILLY H. EZELL
2010 Common Street
Lake Charles, Louisiana 70601

CLERK OF COURT
FIFTH CIRCUIT COURT OF APPEALS
600 Camp Street
New Orleans, Louisiana 70130

Sworn to and subscribed
before me, this 30th day
of January, 1981

Andre' J. Mouledoux
ANDRE' J. MOULEDOUX

NOTARY PUBLIC

APPENDIX A

Winnie Ola CRADOR as Executrix of the Estate of Hurby Crador, substituted in place and stead of Hurby Crador, deceased,

Plaintiff-Appellee

v.

LOUISIANA DEPARTMENT OF HIGHWAYS, State of Louisiana, in personam, and Houston General Insurance Co.

Defendants-Appellants.

No. 78-1396.

United State Court of Appeals,
Fifth Circuit.

Sept. 18, 1980.

Employee mechanic, who sustained back injury while repairing transmission on employer's vessel, sought damages for personal injury under Jones Act and General Maritime Law. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., entered judgment on jury verdict for employee, and appeal was taken. The Court of Appeals, Politz, Circuit Judge, held that: (1) evidence was sufficient to

sustain jury finding that employee was a seaman at time of injury; (2) trial judge properly refused to allow evidence of employee's work history during two years before accident; (3) jury's findings on negligence and unseaworthiness were supported by evidence; (4) award of $250,000 damages was not excessive; (5) there was no reversible error in jury instructions; and (6) rejection of various motions by employer was proper.

Affirmed.

1. Seaman 29(5.16)

Seaman status is a mixed question of law and fact. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, §51(b), 33 U.S.C.As 905 (b).

2. Seamen 29(5.14)

Evidence that employee mechanic was assigned "permanently" to employer's vessel on which he was injured and that duties he performed contributed to accomplishment of vessel's mission provided sufficient evidentiary basis for jury's finding that employee was a "seaman"at time of injury. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905 (b).

3. Seamen 29(5.13)

In action for damages for personal injury under Jones Act

and General Maritime Law brought by employee mechanic who sustained back injury while repairing transmission on employer's vessel, trial judge properly refused to allow evidence of employee's work history during two years before accident for purposes of determining seaman status. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

4. Federal Courts 868

Appropriate standard for testing sufficiency of evidence in a Jones Act case is whether there is a reasonable evidentiary basis for jury verdict. Jones Act, 46 U.S.C.A. § 688.

5. Seamen 29 (5.14)

In action for damages for personal injury under Jones Act and General Maritime Law brought by employee mechanic who sustained back injury while repairing transmission on employer's vessel, evidence was sufficient to sustain jury's findings on negligence and unseaworthiness. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. §905 (b).

6. Federal Courts 871

Where jury finds particular quantum of damages and trial court refuses to upset verdict, before an appellate court orders a remittitur or new trial, it must be certian indeed that award is contrary to all reason.

7. Damages 32

In addition to loss of income, injury, in action under Jones Act and General Maritime Law brought by employee mechanic who sustained back injury while repairing transmission of employer's vessel, was authorized to award damages for pain and suffering and impact on employee's normal life routines. Jones Act, 46 U.S.C.A.§688; Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A.§905(b).

8. Damages 130(3)

Award of $250,000 damages to 48-year-old employee mechanic who was injured while repairing transmission on employer's vessel was not excessive. Jones Act, 46 U.S.C.A.§688; Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A. § 905 (b).

9. Seaman 29(5.17)

In action for damages for personal injury under Jones Act and General Maritime Law brought by employee mechanic who sustained back injury while repairing transmission on employer's vessel, there was no reversible error in jury instructions. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation Act, §5(b), 33 U.S.C.A§ 905(b).

10. Federal Courts 847

Court of Appeals will reverse district court's refusal of new trial only where there is an absolute absence of evidence to support verdict.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, GEWIN and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Hurby Crador, an employee of the appellant Louisiana Department of Highways, sustained a back injury on May 21, 1975, while repairing the transmission on appellant's vessel, the M/V GRAND LAKE FERRY. Crador sought damages for personal injury under the Jones Act, 46 U.S.C.§ 688, and General Maritime Law, 33 U.S.C.§905(b). The district court denied appellants' motions for summary judgment and for directed verdict. The jury found Crador to be a seaman and returned a verdict for $250,000. The district court then denied appellants' motions for judgment notwithstanding the verdict, for new trial, for partial new trial and for remittitur. We affirm.

Appellants assign multiple errors, challenging the finding that Crador was a seaman, the finding with respect to the GRAND LAKE FERRY's seaworthiness, the finding of actionable negligence, certain of the jury charges, the refusal to admit evidence of Crador's work history, the damages awarded, and the denial of appellants' various motions.

Crador was a mechanic. From July 1973 until June 1975, he repaired ferries, bridges, and vehicles owned by the Louisiana Department of Highways (LDH). The GRAND LAKE FERRY

was temporarily used to transport vehicles across the Intercoastal Waterway while repairs were being made to a bridge. Between May 1, 1975 and May 21, 1975, Crador spent 92 hours working on ferries, 77 of which were spent on the GRAND LAKE FERRY.

Appellants contend that Crador was not entitled to seaman status at the time of his injury. The record reveals that Crador was assigned to do the work necessary "to keep [the GRAND LAKE FERRY] going." His duties materially contributed to the ferry's mission. His assignment, in the context made, was permanent. The district court denied a motion for summary judgment on the status issue and correctly submitted that issue to the jury. In *Ross v. Mobil Oil Corporation*, 474 F. 2d 989 (5th Cir. 1973), we affirmed the test to be applied in resolving the jury question issue which we had articulated in *Offshore Company v. Robison*, 266 F. 2d 769, 779 (5th Cir. 1959), as follows:

According to *Robison* there is a legally sufficient evidentiary basis for the case to go to the jury:

> (1) If there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and
> (2) If the capacity in which he was employed or the duties which he performed contributed

> to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

474 F.2d at 990.

[1,2] Seaman status is a mixed question of law and fact. *Holland v. Allied Structural Steel Co.*, 539 F. 2d 476 (5th Cir. 1976). In examining the record within the framework of the *Robison* guidelines we are compelled to the conclusion that there was evidence that Crador was assigned "permanently" to the vessel on which he was injured and the duties he performed contributed to the accomplishment of the vessel's mission. *Davis v. Hill Engineering, Inc.*, 549 F. 2d 314 (5th Cir. 1977). Finding an evidentiary basis for the jury's verdict, our function as an appellate court is completed. This factual dispute may not now be revived and presented to us on appeal. *Manchack v. S/S Overseas Progress*, 524 F. 2d 918 (5th Cir. 1975).

[3] There is no merit in the challenge to the trial judge's refusal to allow evidence of Crador's work history during the two years before the accident. The court permitted evidence of Crador's work assignments during the time the GRAND LAKE FERRY was operational. This ruling is correct. One is not likely to be permanently assigned to a vessel, or even to spend a

substantial amount of time on a vessel such as this ferry, unless it is in operation. The meaningful inquiry is the one permitted by the trial judge, i.e. how "permanent" was the assignment and how much time did Crador spend on the vessel after it was put into operation. This evidence was presented to the jury and the jury's conclusion foreclosed further review. *Manchack, supra.*

[4,5] Appellants challenge the jury's findings on negligence and unseaworthiness. The appropriate standard for testing the sufficiency of the evidence in a Jones Act case is whether there is a reasonable evidentiary basis for the in jury verdict. *Campbell v. Seacoast Products, Inc.,* 581 F. 2d 98 (5th Cir. 1978). Applying that standard we find ample evidence in the record from which the jury could find that the Department of Highways was negligent and its vessel was unseaworthy. For example, there was testimony that Crador was required to work in poorly lighted, awkward and confined quarter without adequate help and without suitable tools and equipment. Once again, upon finding this evidentiary basis our appellate function is exhausted. *Manchack, supra.*

[6] Appellants next contend that the $250,000 damages awarded was excessive. Where a jury finds a particular quantum of damages and the trial court refuses to upset the verdict, before an appellate court orders a remittitur or a new trial, it must be "certain indeed that the award is contrary to all reason." *Menard v. Penrod Drilling Co.,* 538 F.2d 1084, 1089 (5th Cir. 1976). The evidence reflects that Crador was 48 years old and had a work life expectancy of 14 years and a life

expectancy of 22 years at the time of the accident. He suffered a severe disabling back injury. He has been unable to work since the accident. The evidence discloses that he is in a constant state of pain, a previously asymptomatic kidney condition was activated, and he must have the assistance of his wife to walk up and down stairs. His wife discontinued employment to stay home and take care of him. In addition to the disability, the record reflects substantial physical pain and mental anguish.

[7,8] Crador offered the testimony of a consulting actuary as an expert witness. The actuary testified that Crador had damages for loss of earnings of between $104,000 to $110,000, depending on what discount factor is used. In addition to loss of income the jury could award damages for pain and suffering and impact on one's normal life routines. Applying the *Menard* litmus we are not prepared to say that it is "certain indeed that the award is contrary to all reason." We decline to disturb it.

[9] Appellants assign error to various of the jury instructions. We have examined each claimed error. Considering the totality of the instructions as given, and recognizing that the form and structure of the jury charge is within the discretion of the trial court, *Venzina v. Theriot Marine Service, Inc.* 554 F.2d 654 (5th Cir. 1977), we find no reversible error. Appellant's complaint which most nearly approximates a serious challenge relates to the charge given that damages for impairment

of earning capacity are to be measured on the basis of life expectancy. The charge should more appropriately refer to work life expectancy. However, in this instance, considering that the evidence on the subject, related to work life expectancy, and viewing the quantum of damages awarded, we are not persuaded that the jury was in any way confused or misled by the charge as given.

Finally, appellants challenge the district court's rejection of their various motions. Their motion for summary judgment was properly denied. There was a valid, viable question as to whether Crador was a seaman. The motions for directed verdict and judgement n.o.v. were properly denied. In considering those motions the court must consider the evidence in the light most favorable to Crador, and determine whether there is a reasonable evidentiary basis for the jury verdict. *Campbell v. Seacoast Products, Inc., supra.*

[10] Appellants' final motion was for a new trial. We will reverse the district court's refusal of a new trial only when there is an absolute absence of evidence to support the verdict. *Litherland v. Petrolane Offshore Const. Services,* 546 F.2d 129 (5th Cir. 1977); *Urti v. Transport Commercial Coproration,* 479 F. 2d 766 (5th Cir. 1973).

The verdict of the jury and the actions and decisions of the district court are AFFIRMED.

APPENDIX B

United States Court of Appeals
Fifth Circuit

Gilbert F. Ganucheau
Clerk

Tel. 504/589-6514
600 Camp Street
New Orleans, La. 70130

Office of the Clerk
November 3, 1980

TO ALL PARTIES LISTED BELOW:

No. 78-1396 - Winnie Ola Crador, etc. -vs-
Louisiana Department of Highways, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 10) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk

By /S/ Claudia Nedes
Deputy Clerk

cc: Mr. Maurice C. Hebert, Jr.
Mr. Ronald Thompson
Mr. Billy H. Ezell

APPENDIX C

In The United States District Court For
The Western District Of Louisiana
Lake Charles Division

HURBY CRADOR
VS. CIVIL ACTION NO. 760542
LOUISIANA DEPARTMENT
OF HIGHWAYS, ET AL (filed:11/17/77)

* *

JUDGMENT

Based upon the jury's answers to the interrogatories, a copy of which is attached;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Hurby Crador, and against the Louisiana Department of Highways and Houston General Insurance Company, in solido, in the amount of $250,000.00, together with legal interest thereon from this date until paid.

SIGNED this 17th day of November, 1977, at Lake Charles, Louisiana.

/S/ Earl E. Vernon
Earl E. Vernon
United States District Judge

In The United States District Court For
The Western District Of Louisiana
Lake Charles Division

Civil Action No. 760542 (filed: 11/17/77)

* *

VERDICT OF THE JURY

1. Was the defendant negligent? /S/ Yes

2. Was defendant's vessel unseaworthy? /S/ Yes

If your answers to questions 1 and 2 above are "No" then that ends the case and you not consider the other questions. But if your answers to questions 1 or 2 or both are "Yes" then you must answer the other questions.

3. What is the total amount of damages suffered by Mr. Crador? /S/ $250,000

4. Was the plaintiff contributorily negligent? /S/ No

5. If so, to what extent was plaintiff's negligence the cause of the accident? /S/ 0%

/S/ Nov. 17, 1977
Date

/S/ Roy J. Owens
Foreperson

APPENDIX D

In the United States District Court For
The Western District Of Louisiana
Lake Charles Division

HURBY CRADOR

VS. CIVIL ACTION NO. 760542

LOUISIANA DEPARTMENT
OF HIGHWAYS, ET AL

(filed: 11/30/77)

* *

AMENDED JUDGMENT

This matter was tried by jury on the question of the status of the plaintiff and after the jury found the plaintiff was a seaman, it was tried on liability and damages and the jury found for the plaintiff on liability and damages, copies of which are attached hereto.

On November 17, 1977, the day of the jury's verdict of liability and damages, a judgment was signed against the defendants in solido for the full amount rendered by the jury.

It was an error on the part of the court in signing the judgment in solido for the entire sum as defendant, Houston General Insurance Company's liability was linited to the policy limits of $100,000.00, less all compensation and medical expenses paid to or on behalf of plaintiff.

For the foregoing reasons, the judgment signed on November 17, 1977 , is hereby amended to read as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff be and he is hereby declared a seaman in accordance with the jury's answer to the interrogatory.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Hurby Crador, in the full sum of $250,000.00, together with legal interest from November 17, 1977, until paid and against the defendants in solido up to the sum of $86,737.74 and against the Louisiana Department of Highways only for the additional sum of $163, 262.26.

SIGNED at Lake Charles, Louisiana on the 28th day of November, 1977.

/S/ Earl E. Vernon
Earl E. Vernon
United States District Judge

APPENDIX E

United States District Court
Western District Of Louisiana
Lake Charles Division

HURBY CRADOR	*	CIVIL ACTION
VERSUS	*	NO. 760-542
LOUISIANA DEPARTMENT OF HIGHWAYS, ET AL	*	

* * * * * * * * * * * * * * * * * *

ORDER FOR STAY OF JUDGMENT

The Court having considered the motion of Louisiana Department of Highways (now designated as Department of Transportation and Development, Office of Highways) and Houston General Insurance Company for stay of the judgment rendered against them on Novmeber 30, 1977, for the reasons therein;

IT IS HEREBY ORDERED that the judgment in this matter rendered by the Court and entered by the Clerk on November 30, 1977 in favor of the plaintiff and against Louisiana Department of Highways (now designated as Department of Transportation and Development, Office of Highways) and Houston General Insurance Company be, and it is hereby stayed;

IT IS FURTHER ORDERED that the execution of the judgment not be issued out of this proceeding until further Order of the Court.

Lake Charles, Louisiana, this 24th day of February, 1978.

/S/ Earl E. Vernon
United States District Judge

APPENDIX F

In the United States District Court For
The Western District Of Louisiana
Lake Charles Division

CIVIL ACTION NO. 760542

HURBY CRADOR

VS.

LOUISIANA DEPARTMENT OF HIGHWAYS, ET AL

FOR PLAINTIFF

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FOR DEFENDANTS

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HUNTER, SENIOR JUDGE:

Defendants, the Louisiana State Department of Highways and Houston General Insurance Company, have moved this

Court to dismiss and/or grant a summary judgment against the claim of plaintiff on the grounds that plaintiff lacks status as a Jones Act seaman. Defendants argue that the facts in this case establish that plaintiff's connection with the ferries was transitory and fortuitous and merely incidental to his job as a mechanic. The determination whether a claimant has proved a sufficient connection with water-borne or vessel-related activities to invoke jurisdiction as a seaman under the Jones Act is a mixed question of law and fact. *Offshore Company v. Robison,* 266 F.2d at 780.

The facts of this case are unique. No useful purpose would be served by reviewing those facts at this time. The motions to dismiss and/or for summary judgment are denied. We intimate no view, one way or the other, of whether or not in the final analysis the Court might direct a verdict on the question of status.

It really does not matter too much in the final analysis whether Crador is a seaman or not. This is so because under the rule of *Smith v. M/V Captian Fred,* 546,F.2d 119 (5th Cir. 1977), a repairman aboard a vessel may sue the vessel on which he was injured for both its negligence and unseaworthiness when as here the owner of the vessel is also the employer. We hold that Crador has a cause of action against the Department of Highways if he was injured as a result of the ferry's negligence and/or unseaworthiness. We note that the two other circuit courts of appeals have reached the same conclusion. *Napoli v. Helenic Lines, Ltd.,* 536 F.2d 505 (2nd Cir. 1976); *Griffith v.*

Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3rd Cir. 1975), cert. denied, 423 U.S. 1054, 96 S. Ct.785, 46 L.Ed. 2d 643 (1976).

Defendants have twenty (20) days to further answer, and the case will be set for trial in the immediate future.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 10th day of May, 1977.

/S/ Edwin F. Hunter, Jr.
Edwin F. Hunter, Jr.
Senior United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

HURBY CRADOR

VS. CIVIL ACTION NO. 760542

LOUISIANA DEPARTMENT OF
HIGHWAYS, ET AL

MEMORANDUM RULING

Defendants, Louisiana State Department of Highways and Houston General Insurance Company, take issue with the Court's ruling of May 10, 1977, particularly the Court's reliance that "the Jones Act involves a mixed question of law and fact." The Court agrees that the ultimate material facts regarding Crador's status are not in serious dispute. However, this does not necessarily mean that the Court should grant a motion for summary judgment.

Under the particular total circumstances of this case, and particularly because Crador would have a cause of action against the Highway Department if the ferry was negligent or if there was unseaworthiness, we deny the motion for a rehearing. We reiterate that as to the Jones Act facet of this

case, we might well grant a directed verdict at an appropriate time.

The motion for a re-hearing is denied.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 20th day of May, 1977.

/S/ EDWIN F. HUNTER, JR.

EDWIN F. HUNTER, JR.
UNITED STATES DISTRICT
SENIOR JUDGE

APPENDIX H

David DAGNALL, Plaintiff-Appellee,

v.

Succession of Barney GEGENHEIMER et al., Defendants,

Department of Highways, State of Louisiana, Defendant-Appellant.

No. 79-1805.

United States Court of Appeals, Fifth Circuit.

Dec. 3, 1980.

Personal injury suit was brought against the Louisiana Department of Highways. The United States District Court for the Eastern District of Louisiana, at New Orleans, Adrian G. Duplantier, J., 466 F.Supp.245, denied the Department's motion for judgment notwithstanding verdict, based on the Eleventh Amendment, and the Department appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) suit brought by Wisconsin resident was barred by the Eleventh Amendment; (2) attorney for the Department had no authority to waive the Eleventh Amendment right of the

state not to be sued in federal court; and (3) state was not precluded from asserting its immunity after it had sought favorable verdict and lost before the jury.

Judgment vacated and appeal dismissed.

1. Federal Courts 269

Eleventh Amendment barred suit of Wisconsin resident against Louisiana Department of Highways for alleged negligence in installing highway median barriers which did not meet prevailing industry standards. U.S.C.A.Const. Amend. 11.

2. Federal Courts 622

Eleventh Amendment rights of a state are sufficiently jurisdictional to be asserted for the first time on appeal. U.S. C.A.Const. Amend. 11.

3. Federal Courts 266

Attorney for the Louisiana Department of Highways had no authority to waive Eleventh Amendment right of the state not to be sued by resident of another state in federal court. U.S.C.A.Const. Amend. 11; LSA-R.S. 13-5106.

4. Federal Courts 266

State was not precluded from asserting its Eleventh Amendment immunity after it had sought favorable verdict and lost before the jury. U.S.C.A.Const. Amend. 11.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

CHARLES CLARK, Circuit Judge:

The Louisiana Department of Highways (the Department) appeals from a judgment rendered against it in this negligence action. The eleventh amendment, the Supreme Court's interpretations thereof, and the law of the State of Louisiana require the vacation of this judgment and dismissal of the appeal.

David Dagnall and two co-workers were going to work on the Pontchartrain Expressway in New Orleans at four o'clock a.m. on July 4, 1975, when a vehicle driven by Gegenheimer in the opposite direction went out of control, crossed the concrete median after straddling it for 185 feet, and struck Dagnall's vehicle head-on. Gegenheimer was killed and Dagnall received extensive injuries. Dagnall, a resident of Wisconsin, brought this diversity action against Gegenheimer's estate, which settled out of court, and the Department. At trial, Dagnall's evidence showed that the barriers used in the medians on the expressway did not meet the prevailing industry standards and that if the barriers had met those standards, he would not have been injured. After the jury returned a verdict awarding Dagnall $100,000.00, the Department filed a motion for a new trial combined with a motion for judgment notwithstanding the verdict, arguing for the first time that the trial court

lacked jurisdiction over the action under the eleventh amendment. The trial court held that the Department had waived its eleventh amendment immunity by its pretrial stipulation that it was amenable to suit and by failing to raise the jurisdictional issue until after trial. Before this court, the Department argues that the eleventh amendment deprives the trial court of jurisdiction, and that there was insufficient evidence to support the jury's verdict. Because the former issue is dispositive, we do not discuss the latter.

[1,2] The eleventh amendment expressly bars the suit of Dagnall, a resident of Wisconsin, against the State of Louisiana. Dagnall does not dispute the Department's claim that it is a state agency entitled to invoke eleventh amendment limitation on the judicial power of the United States. It is clear that the eleventh amendment rights of a state are sufficiently jurisdictional to be asserted for the first time on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed. 2d 662, 681 (1974). So then, unless the State has waived its eleventh amendment immunity, the district court was without jurisdiction. In *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed.389 (1945), the Court addressed the question whether the administrative and executive officers of Indiana had the authority to waive that State's eleventh amendment immunity. *Id.* at 466, 65 S.Ct. at 352, 89 L.Ed. at 395. Noting that the question was one of state law, but that the state courts had not ruled on the question,

the Court concluded from the Indiana Constitution that the attorney general had no authority to waive the State's immunity. *Edelman's* holding that the trial of that case did not bar the State from raising its immunity at the appellate level did not address the question of waiver nor did it distinguish the *Ford Motor* decision, see footnote 19, 415 U.S. at 677, 94 S.Ct. at 1363, 39 L.Ed.2d at 681.

[3] Louisiana law makes clear that no attorney for the State could have the authority to waive its eleventh amendment immunity. LSA:RS 13:5106 provides: "No suit against the state or other public body shall be instituted in any court other than a Louisiana state court." It has been held that this section deprives counsel of authority to consent to suit in federal court. *AT&T v. Madison Parish Police Jury,* 465 F.Supp. 168 (W.D.La. 1977). By the very nature of this question, no state court would rule on it unless by certification. In view of this specific statute, the general Louisiana law regarding a state attorney's authority to prosecute or defend a suit is without significance. The attorney for the Department had no authority to waive the eleventh amendment right of the State of Louisiana not to be sued by Dagnall in a federal court.

[4] The State has asserted its immunity only after it sought a favorable verdict and lost before the jury. Had it prevailed, Louisiana would doubtless be claiming the case was tried with its consent. That today's decision might permit such

an inequity cannot overcome Louisiana's plain constitutional right and clear statutory provision.

Because the State of Louisiana is immune from suit in federal court by a citizen of another state, and because Louisiana has not waived this eleventh amendment immunity, the trial court was without jurisdiction and so are we. The judgment appealed from is vacated and the appeal is dismissed.

VACATED AND DISMISSED.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

HURBY CRADOR

VS. CIVIL ACTION NO. 760542

LOUISIANA DEPARTMENT OF
HIGHWAYS, ET AL

EXCERPT FROM TRIAL PROCEEDINGS,
NOVEMBER 14, 1977 (PP 49-57 of TRIAL TRANSCRIPT)

PROCEEDINGS IN OPEN COURT, OUT OF THE PRESENCE OF THE JURY.

THE COURT: All right. Do you want to go ahead and make your offering and I will maintain the objection and let the other side make the objection and then you can make your offer of proof. All right. Let the record reflect the jury is not present at this time. Let's see, Gentlemen. So that we can get the court record in proper order, you were in the process, Mr. Hebert, of going into some material relating back for a period of two years concerning the plaintiff's employment. And at that time we had an objection at the Bench as to allowing you to go that far back in going into the question of whether the plaintiff is a seaman or not. Am I correct?

MR. HEBERT: I think basically that is correct, Your Honor.

THE COURT: All right. Now, for the record then, Mr. Ezell, would you state your objection on the record so that we can proceed?

MR. EZELL: Our objection is directed to the relevancy of the materials as they date back for two years, or a two year period, in reference to Mr. Crador's employment with the Highway Department and his connection with the vessel or vessels within this district. So we are objecting to the introducing of the evidence as to his work period prior to the on-vent of the ferry here, the Grand Lake Ferry.

THE COURT: All right. I will maintain the objection. And, Gentlemen, for the record, I will maintain it right now while the jury is out so that you may make an offer of proof, Mr. Hebert. But when we bring the jury back in, I want him to make the objection again in the presence of the jury and I will make the ruling in the presence of the jury so that the record will be complete. Is that agreeable, sir?

MR. HEBERT: Yes, sir. Fine.

THE COURT: All right.

MR. HEBERT: Okay, Your Honor, the offer of proof on behalf of the defendant encompasses this. I have submitted, as the record would show, to Mr. Crador all of the work records, the daily work reports, State of Louisiana, Department of Highways, for a period of time dating from May the 16th,

1973 through May the 21st, 1975, which is the date of the alleged accident. I had also submitted, in fairness to Mr. Crador and counsel who has already submitted the same daily work reports for the period of time, from May 21st, 1975 through the date of June, July the 17th, 1975. Okay. And it is my understanding that the Court will sustain the objection to any testimony or admissibility of records prior to the date of May the 9th, 1975, Mr. Crador's first day aboard the vessel.

THE COURT: No, that is incorrect. I said, and I want this for the record to be absolutely clear, that the parties stipulated for the benefit of the jury that this vessel was located at Grand Lake for at least a period from May 9th, 1975 through August, 1975.

MR. HEBERT: Right. That is correct, Judge.

THE COURT: And my ruling is that the evidence as to whether he is a seaman is to be restricted to the entire period of time that the ferry was there, meaning if it was prior to May 9th, you can offer any evidence as long as it is for the period of time in which the ferry was located at the Grand Lake location.

MR. HEBERT: Okay. I understand. That's fine. And I would introduce all of those work records, Your Honor, for the period of time that I just mentioned, 5-16-73 through 7-17-75 as Defendant One.

THE COURT: Why don't you make it Defendant One, offer of proof.

MR. HEBERT: That's fine.

THE COURT: As opposed to Defendant One in case you have some other exhibits.

MR. HEBERT: That will be fine.

THE COURT: That will be Defendant Number One, offer of proof. Let the offering be received for the offer of proof.

(Whereupon said work records,
(marked D-1-offer of proof, for
(identification was received into
(evidence and filed with the Clerk
(of Court.

MR. HEBERT: Thank you, Judge.

THE COURT: Do you have anything further, Mr. Hebert?

MR. HEBERT: Yes, sir, I do. If it please the Court, the records that I have just submitted to the Court encompasses the marine activities of Mr. Crador from the date of 5-16-73 through 7-17-75. He has already testified that the designation Lake Ferry. 34031 and 348033 are engines aboard the Grand Lake Ferry. We have made a compilation of the Defendant One records, Your Honor, to include this date, the equipment number, the miles driven to the job site, the hours including travel, we have taken that and made some other compilations shown on it, on the compilation as to what we considered irrelevant, such as percentage of time and otherwise. The

irrelevant, such as percentage of time and otherwise. The only thing that isn't in the record at this time is the designation 305028 which I understand is another barge that operates somewhat as a ferry. May we have a stipulation to that effect?

MR. TYNES: Concerning the compilations?

MR. HEBERT: That that is what that designation stands for.

MR. TYNES: We will stipulate the designation is correct as stated.

MR. HEBERT: Okay, Judge. And we would offer that.

MR. TYNES: But we would like to see the offering, the physical page there, to see how you have got it written down.

MR. HEBERT: Well, I gave Billy a copy.

MR. TYNES: Oh, I'm sorry.

MR. HEBERT: I might add for the record, which the Court would notice on the compilation, is overtime.

THE COURT: Well, I don't need to see it since it is an offer of proof.

MR. HEBERT: Okay.

MR. TYNES: Your Honor, for the purposes of the offer of proof and to avoid any need of calling a witness, we will stipulate as to the total hours worked and dates and designations but we won't stipulate as to the number of hours that constituted travel hours because they are figured on the basis of fifty-five miles an hour. And it is just a question of arithmetic but there are some assumptions there that may alter the

hours traveled considerably, such as speed and the difference between forty and fifty-five.

MR. HEBERT: No, I understand that. That is correct. The compilation that we will introduce, Your Honor, is a synopsis or resume of all of the records that we have just introduced in Defendant Number One, offer of proof. I understand what counsel says and certainly that's correct.

THE COURT: All right.

MR. HEBERT: So I would offer that as Defendant Two, offer of proof.

THE COURT: Any objection other than the qualification as to Defendant Two, offer of proof?

MR. TYNES: No, Your Honor.

THE COURT: Let the offering be received.

(Whereupon said compilation marked
(Defendant Two, offer of proof,
(for identification was received
(into evidence and filed with the
(Clerk of Court.

THE COURT: All right. What is next, Gentlemen?

MR. HEBERT: I could either put Mr. Bass on the stand to testify that he has researched all of those vessels and those are all of the vessel related activities of Mr. Crador for the period of time indicated on the records, if counsel would require that.

THE COURT: Well, check with them and see if they will stipulate. If they will stipulate, then you won't have to do it, sir.

(Whereupon an off the record
(discussion was had between
(counsel.

MR. EZELL: I don't have any objection. We would stipulate.

THE COURT: All right. State the stipulation before the microphone, please, Mr. Hebert.

MR. HEBERT: The stipulation is that if Mr. Bass were called to testify, but counsel has already stipulated that the records introduced as Defendant One and the compilation introduced as Defendant Two accurately reflect all of the vessel related activities of Mr. Crador for the period of time from 5-16-73 through 7-17-75.

THE COURT: Is that stipulation agreeable, Gentlemen?

MR. EZELL: Yes, Your Honor, that's correct.

THE COURT: All right. Let the stipulation be made a part of the offer of proof. Anything further with your offer of proof?

MR. HEBERT: Okay. Your Honor, there is only one thing I would like to put on the record, if I might, what I told the Court earlier today, this afternoon in our meeting during the recess prior to this time. This is the position that we have

maintained throughout the lawsuit involved for the two year period.

THE COURT: All right.

MR. HEBERT: Shall I go into this?

THE COURT: Well, go ahead and say what you want to. You are making an argument to the Court and I will listen to you, Mr. Hebert.

MR. HEBERT: Okay. It's just our position, Your Honor, that from the Jones Act point of view to determine temporary assignments versus overall duties to determine a man's position as a seaman with regard to continuity and regularity that we think that something more than just a period of time that this one particular point of the vessel being there should be determined and that was our reasoning. And I just think the record ought to reflect our position as to why we think that this information is relevant.

THE COURT: All right. Let his remarks be put on the record. I have no comment to make.

MR. HEBERT: Okay. No, I think I am required to do that, Your Honor.

THE COURT: All right. Anything else on the offer of proof?

MR. HEBERT: I guess that is about it, Judge.

THE COURT: Could we have the jury brought in?

APPENDIX J

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdication in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX K

28 U.S.C. §1254. Courts of appeals, certiorari, appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX L

Louisiana Constitution Article XII §10. Suits Against the State

Section 10. (A) No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

(B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

(C) Procedure; Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

APPENDIX M

Louisiana Acts 1975, No. 424 §1

LSA-R.S. 13:5101. Application

This Part applies to any suit in contract or for injury to person or property against the state, a state agency, or a political subdivision of the state, as defined herein, and also applies to any other suit expressly authorized by special or general law or resolution adopted by the legislature.

LSA-R.S. 13:5102. Definitions

A. As used in this Part, "state agency" means any board, commission, department, agency, special district, authority, or other entity of the state, but does not include any political subdivision or any agency of a political subdivision.

B. As the term is used in this Part, "political subdivision" means any parish, municipality, special district, school board, public board, institution, department, commission, district, corporation, agency, authority, or an agency or subdivision of any of these, and other public or governmental body of any kind which is not a state agency.

LSA-R.S. 13:5105. Jury trial prohibited

No suit against the state or a state agency or political subdivision shall be tried by jury.

LSA-R.S. 13:5106. Limitation

No suit against the state, state agency, or political subdivision shall be instituted in any court other than a Louisiana state court.

80-1300

NO.

MAY 13 1981

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOUISIANA DEPARTMENT OF HIGHWAYS
STATE OF LOUISIANA, in personam,
and HOUSTON GENERAL INSURANCE CO.,
Defendants-Petitioners

versus

WINNIE OLA CRADOR AS EXECUTRIX OF THE
ESTATE OF HURBY CRADOR, ETC.,
Plaintiff-Respondent

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Malkowitz v. Lykes Bros., S. S., Co.,

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Plaintiff was a Jones Act Seamen?

II. Whether the Lower Court errored by not allowing Evidence of Plaintiff-Respondent's Life Work History with the Highway Department.

III. Is the Plaintiff-Respondent's Claim for Releif under the Jones Act Barred by the Sovereign Immunity of the State of Louisiana, as Imposed by the Eleventh Amendment.

PRAYER

Plaintiff-Respondent prays that the Petition for Certiorari filed by Defendants-Petitioners for review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 18, 1980, be denied.

OPINIONS BELOW

The judgment of the Court below is reported at 625 F. 2d 1227 (5th Cir. 1980), rehearing en banc denied, 632 F. 2d 894 (5th Cir. 1980). The amended judgment and the verdict of the jury.

GROUNDS FOR JURISDICTION

The Jones Act, 46 U.S.C. 688 (1975)

The General Maritime Law, 33 U.S.C. 905(b) (1978)

STATEMENT OF THE CASE

Hurby Crador, an employee of the Louisiana Department of Highways, State of Louisiana, sustained injuries of his back on May 21, 1975, while repairing or replacing a transmission aboard the Grand Lake Ferry. This ferry had been placed in this highway district for the purpose of transporting cars across the Intercoastal Waterway while repairs were being made on the permanent pontoon bridge. While Mr. Crador and his fellow employee, Mr. Pike, were repairing or replacing the transmission on the ferry, Mr. Crador injured his back.

Mr. Crador instituted this suit on May 2, 1976, and named as parties, defendants, Louisiana Department of Highways (hereinafter referred) to as Houston General), the liability insurer of the Highway Department. The suit was filed under the Jones Act, 46 U.S.C.A. s688, the General Maritime Law and in accordance with 33 U.S.C.A., Section 905 (b).

The Highway Department and Houston General filed an Answer and an Amended Answer to the complaint, denying any negligence, unsea worthiness of the vessel and denied that Mr. Crador was a seaman. The Answer and Amended Answer filed by Houston General and the Highway Department was a general denial of all factual allegations and an assertion of the affirmative defenses.

Defendants filed a Motion to Dismiss and/or for Summary Judgment on the grounds that the Lower Court lacked jurisdiction, because Mr. Crador lacked "seamen" status to sue under the Jones Act and the General Maritime Law. Judge Edwin F. Hunter, Jr. initially heard the Motion reserving to the Plaintiff the right to file for a rehearing. Rehearing was granted and the Motion was reheard on April 28, 1977 and a decision denying the Defendant's Motion on May 11, 1977. At the rehearing held on April 28, 1977, Judge Hunter correctly pointed out the issue of law presented, "There is no question

about that. I mean, the Court understands that. He wasn't a member of the crew of that vessel in the terms that he was permanently assigned to it. Of course, the Jones Act test uses the language of more or less permanently attached or did a substantial portion of his work aboard a vessel. And it uses the word or, O-R." "Now, the question for this Court to determine is whether this amounted to this man performing a substantial part of this work aboard a vessel or vessels belonging to the Highway Department, so as to make it a jury question." "The jurisprudence is replete and the Fifth Circuit has reviewed this matter over and over again within the last year but they continued to refuse to say what is a substantial portion of your time. In fact, they do not refuse to do so by omission, they merely state affirmatively we decline to say what is or is not a substantial portion."

Plaintiff must point out that Judge Hunter had before him when he ruled on the Motion all of the information with regard to passed life work history and the work history of Mr. Crador from the date of the arrival of the ferry, on

which he was hurt, until he was no longer able to work. In review of all this, Judge Hunter decided that the issue of "Status" should go to the Jury.

The case was set for trial on November 14, 1977. The jury trial was bifurcated to determine the issue of seamen status, apart from the question of liability and damages. The question of "status" was determined by the jury in favor of the Plaintiff.

At the conclusion of Plaintiff's case on liability and damages, Defendat made motions for directed verdict and partial directed verdict, then, again at the close of his defence, both of which were denied.

The case was submitted to the jury on November 17, 1977, and a verdict in favor of the Plaintiff was returned in the amount of $250,000.00. A judgment for that amount was entered in the Lower Court on that date. That judgment was amended on November 31, 1977.

On December 7, 1977, Defendants filed post-trial motion for Judgment N. O. V., Partial Judgment N. O. V., New Trial, Partial New Trial, and Remittitur. Briefs on these motions were filed by both Plaintiff and Defendant. The oral argument on the motions were heard by Judge Earl Veron on January 24, 1978, and said motions were denied.

Oral argument was presented to the Fifth Circuit panel consistion of Circuit Judges John R. Brown, Walter P. Gewin and Henry A. Politz. Following oral argument, the panel affirmed the rulings and judgment of the Lower Court in all respects, 625 F.2d (1980). Following the opinion of the Fifth Circuit panel, petitioners timely filed a Petition for Rehearing En Banc, which Petition was denied on November 3, 1980, 632 F2d 894 (5th Cir. 1980)

We are now before this Court by way of Petitioners timely Petition for Certiorari.

STATEMENT OF THE FACTS

SEAMEN STATUS

As a starting point the Plaintiff and Defendant stipulated that:

a) Defendant, Highway Department, was the owner and operator of the Grand Lake Ferry.

b) Plaintiff, Mr. Hurby Crador, was employed by the Highway Department as an Auto Mechanic II on May 21, 1975.

c) Mr. Crador did not sleep or eat on the Grand Lake Ferry.

d) None of the employees on the Grand Lake Ferry slept on the ferry.

e) The Grand Lake Ferry was located at Grand Lake on a temporary basis, as a mode of transportation across the Intercoastal Canal in as much as the permanent pontoon bridge was undergoing repairs, for at least the period from May 9, 1975 through August, 1975.

f) The Grand Lake Ferry was a vessel in navigation on the Intercoastal Canal in Louisiana when Mr. Crador was injured.

Mr. Crador had a permanent classification of Auto Mechanic II. As a result of his classification he was permanently assigned to work on ferries in the district on which Lake Charles and Cameron are located.

Considering only the time sheets introduced in P-I, the total time spent working on ferries from May 1, 1975 through May 21, 1975, was ninety-two hours on the Grand Lake Ferry.

After Mr. Crador returned to work on June 3, 1975, he worked until July 17, 1975, and during that period he spent seventy-nine (79) hours working on ferries of which seventy-five of the seventy-nine hours were spent on the Grand Lake Ferry.

The percentage of time spent working on the

Grand Lake Ferry during the periods setforth above, shows that Mr. Crador spent 46% of his time out of the available working hours, 376 hours, less 24 hours for sick leave, annual leave and one holiday or 352 hours.

Mr. Crador repaired ferries, bridges, trucks and cars, and spent so much time on the Grand Lake Ferry he could not off the top of his head give an estimate. He not only did repair to the engine on the Grand Lake Ferry but repaired the hudraulic pump, light plant, rams, changed spark plugs, and changed oil filters. It is clear from the testimony of Mr. Crador and Mr. Pike, a fellow employee, aht one of his primary duties was to work on the ferries in Lake Charles and Cameron area, due to the fact that he was on twenty-four hour call and was issued a life preserver as part of the equipment issued by his employer. Both Mr. Crador and Mr. Pike testified that they were instructed to "keep it

going", referring to the Grand Lake Ferry.

The facts as shown above by testimony and exhibits very clearly shows that Mr. Crador was more or less permanently assigned to a vessel or vessels and that he did a substantial part of his work aboard one of the vessels. It is also clear that he was doing work which aided the vessel in navigation while it was in navigation. The District Corut was asked by way of Motion for Summary Judgment to decide whether there was a jury question and it found in the affirmative.

REASONS FOR DENYING WRIT

The questions raised by Petitioners Writ have been answered by this Corut and the various Federal Courts of Appeal.

ARGUMENT

The District Court after hearing oral agrument on Motion for Summary Judgment granted Respondent time in which to present further evidence on the motions. After hearing all the tistimony and reviewing the affidavits filed by both Petitioners and Respondent, judgment was rendered denying Petitioner's motion.

Appellee feels it necessary to reiterate the facts of this particular case. Mr. Crador had been employed by the Highway Department for twenty years prior to his injury on May 21, 1975. The Grand Lake Ferry was located on the Intercoastal Canal from May 9, 1975 until August 1975. Prior to the date of Mr. Crador's injury, there were nine (9) scheduled working days, or seventy-two (72) hours of regular work time that Mr. Crador could have worked. It is clear that he worked seventy-seven (77) hours on the Grand Lake Ferry during that period. It is also clear that Mr. Crador during that same period

of time worked on other ferries in the Lake Charles-Cameron area. It is abundantly clear from both Petitioner's and Respondent's memorandum, affidavits and testimony at trial, that the Grand Lake Ferry was upon navigable waters, in navigation and Mr. Crador was aiding in its navigation.

The standard test for determining Jones Act Status is setforth in Offshore Company v. Robinson, 266 F2d 769 (5th Cir. 1959).

> "...there is an evidentiary basis for a Jones Act case to go to the Jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water, but designed to float on water), or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed

to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." 266 F.2d at 779 (Emphasis added).

This test was enlarged by the decision of this Court in Braniff v. Jackson Ave.-Grenta Ferry, Inc., 280 F.2d 523 (5 Cir. 1960), in that the Corut found "no insurmountable difficulty with respect to element (1) in the fact that such person is "Assigned permanently to" several specific vessels "or perform(s) a substantial part of his work on the "several specified "vessel(s)."

PERMANENT ASSIGNMENT

Mr. Crador was given the responsibility of keeping the ferries in the Lake Charles-Cameron area or Department of Highways, District 07, running. However, with the coming of the Grand Lake Ferry, which was a temporary mode of transportation brought in to replace a pontoon bridge, Mr. Crador became more or less permanently assigned to the Grand Lake Ferry. Mr. Crador and Mr. Pike testified that they were given orders to "keep it going". It is also abundantly clear that Mr. Crador did a substantial part of his work aboard and on the Grand Lake Ferry and all of the work contributed to the function of the vessel and the welfare of the vessel.

Of course, Petitioner would have the Court believe that Respondent fails the test set out in Robinson and Braniff, in that, the relation-

ship with the Grand Lake Ferry was spasmodic. The truth of the matter is that "We had orders not to tie it (Grand Lake Ferry) up unless it was completely demoloshed. I mean, it couldn't be run, otherwise, keep it rolling." The attachment to this ferry was not spasmodic and the relationship between Mr. Crador and vessel was substantial in point of time and work. Braniff B. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 528, (5 Cir. 1960)

The facts of the present case are easily distinguished from those in Rotolo v. Halliburton Company, 317 F.2d (5 Cir. 1963), Fazio v. Lykes Bros., S. S. Co., Inc., 567 F.2d 301 (1978), and Malkowitz v. Lykes Bros., S. S. Co, Inc.,(C.A. 70-3393, "I" E.D. La. 1972) aff'd per cur. 5th Cir. 1973. In all of the cases cited above, the Court refers to the fact that at no given time was Rotolo, Fazio or Malkowitz, either assigned to repair two or more boats, had not permanent connection of any type to any vessel or group of vessels; nor ever charged

with the duty of keeping a single boat in repair.

The present case presents the Court with a factual situation which shows that Mr. Crador was assigned to keeping the ferries (a group of vessels) in the District 07 area repaired and that he was specificially assigned the task of keeping one vessel going, the Grand Lake Ferry.

Furthermore, the Court is presented with a factual situation which clearly shows that Mr. Crador spent a substantial part of his work time on a vessel that was in navigation and the work performed was that which aided in its navigation.

It is Appellant's contention, as can be seen form the questions asked of Mr. Bass, the only witness called by the Petitioners, that because of the classification given Mr. Crador he would clearly be something other than a seamen. The fact that "...an employer hires men

to work on the water on vessels engaged in navigation and permits them to have such a permanent connection with the vessel as to expose them to the same hazards of marine service as those shared by all aboard should not be permitted by merely restricting their duties or by adapting particular nomenclature as descriptive of their task, to limit his liability to such employees, in the event of disability or death alleged to have been caused by the negligence of the employer, . . ."Wilkes v. Mississippi River Sand & Gravel Co., (6 Cir. 1953) 202 F.2d 383,388.

The statement by Judge Edwin F. Hunter, Jr., that, "There is no question about that. I mean, the Court understands that. He wasn't a member of the crew of that vessel in the terms that he was permanently assigned to it. Of course, the Jones Act test uses the language of more or less permanently attached or did a substantial

portion of his work aboard a vessel." (Emphasis added).

This clearly indicates that the "test of seamen status" is broader than Petitioner would have the Court think it to be, in that, Petitioner would have the Court to believe that only the pilot, 1st. and 2nd. mates, and those of "blue water" nature will be seamen. The facts of this case "are unique" as Judge Edwin F. Hunter, Jr. stated.

It is clear, however, that on the facts of this case, there was sufficient evidence for the case to go to the jury for the determination of whether Mr. Crador was a seamen.

SUBSTANTIAL WORK

The facts and evidence presented by way of testimony and exhibits clearly substantiates the Respondent's position that Mr. Crador performed a substantial part of this work on vessels and particularly the Grand Lake Ferry.

Respondent feels that the Court can of course, look at the cases cited by Appellant, ie. . . Holland v. Allied Structural Steel Company, Inc., 539 F.2d 476 (5 Cir. 1970); Brown v. ITT Rayonier, Inc., (5 Cir. 1974) 497 F.2d 234; Labit v. Carey Salt Co., 421 F.2d 1333; Keener v. Transworld Drilling Co., (5 Cir. 1972) 468 F.2d 729; Davis v. Hill Engineering, Inc., 459 F.2d 314 (5 Cir. 1974), but it is clear to Respondent that all of these cases do not present the same factual situation as found in the present case.

In Holland, you have a structual steel worker doing work on a bridge when he fell to

his death. There was no showing that injury arose out of service to the vessel or that he did a substantial part of this work on any vessel.

In Brown, it is clearly shown that he was assigned on one occasion to accompany another employee on a short trip in a 17 foot outboard motorboat. He certainly was not permanently assigned nor did he do a substantial part of his work on the vessel.

In Labit, the plaintiff was a worker loading salt by means of a conveyor belt and was not injured "upon navigable waters of the United States", in that he was standing on the dock when his injury occurred. 421 F.2d at 1334. The only connection with a vessel was the fact that Labit occassionally went aboard a power boat used to position vessels prior to loading. 421 F.2d at 1335.

In Keener, we have a worker on a fixed platform, who through a fortuitous occasion, electrical failure, spent three or four days scrapping paint and painting an engine room on the tender where he and the platform crew ate, slept, and spent off-duty time. 468 F.2d at 731. The Court in Keener correctly states the position of Appellee in the present case with regard to permanency:

> "Just as there can be no precise delineation of that quantum of duties which, when performed on board a vessel, will make the employee a seamen, similarly there is no bright-line test to be applied in determining the degree of frequency and regularity of performance which must be shown in order to claim status. However, more is required than the one isolated occurrence in this case. We do not hold that an employee must perform all

of his duties or even a greater part of them aboard the vessel in order to be considered a seamen." 468 F.2d at 732.

In Davis, the Court found that Davis was permanently assigned although he did not meet the other possible requirements, of doing a substantial portion of his work on a vessel or vessels. 549 F.2d at 326.

This Court has been hesitant to deny seamen's status on the basis of a wooden application of the permanency criterion because the test as been developed and applied in circumstances different from those found in the present case. This case presents a situation where a substantial part of man's work is spent on a particular vessel, he was more or less permanently assigned and he was doing work which aided the navigation of the vessel, while it was in navigation. Robinson, and the cases reviewed in that case, along with McKie v.

Diamond Marine Co., (5 Cir. 1953) 204 F.2d 132, have denied seamen's status to those accidents where you have land based worker providing land based services to docked vessels. This is of course, not the situation presented in the case before this Court.

EVIDENCE OF PAST WORK HISTORY

The District Court denied the Petitioner use of the work history of Mr. Crador for the two year period preceding the accident in question based on the objection of counsel for Respondent that it was totally irrelevant, due to the fact that the Grand Lake Ferry had not been in the Lake Charles area for that period of time. It should also be noted that there was no objection by Petitioner to the evidence presented in the District Court marked P-I (Work records of Mr. Crador from May 1, 1975 - May 21, 1975 and June 3, 1975 - July 17, 1975).

The question of past work history blends into the question of was Mr. Crador more of less permanently assigned to a vessel or vessels and "One is not likely to be permanently assigned to a vessel, or even to spend a substantial amount of time on a vessel such as

this ferry, unless it is in operation". (Judge Palitz opinion September 18, 1980). Citing Manchack v. S/S Overseas Progress, 524 F.2d 918 (5 Cir. 1975).

ELEVENTH AMENDMENT BAR TO SUIT JONES ACT SUIT BY RESPONDENT

In its Petition for Certiorari, the defendant-petitioner contends that "the federal courts lack the jurisdiction over petitioner based upon the immunity afforded by the Eleventh Amendment of the Constitution." Petition for Certiorari at 8-9.

The eleventh amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Accordingly, although the eleventh amendment does not bare a citizen form suing his own state,

> it is established that an unconsenting State is ummine form suits brought in federal courts by her own citizens as well as by citizens of another state.

Employees of Department of Public Health & Welfare v. Missouri, 411 U.S. 279, 280 (1973).

In the present case, the Louisiana Highway Department, which owned the Grand Lake Ferry, was operating that ferry between May 9, 1975 and August 1975, as a temporary replacement for a permanent bridge which was them undergoing repairs. Therefore, the plaintiff-respondent contends that, the Highway Department, by operation said ferry, had entered into a federally-regulated shpere when the plaintiff was injured on May 21, 1975. Accordingly, the Highway Department had waived its sovereign immunity, and the Jones act, 46 U.S.C. § 688, provides a remedy to the plaintiff. This argument is supported by a series of federal cases. For example, in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), an interstate compact created the Tennessee-Missouri Bridge Commission and authorized it

to build a bridge and operate ferries across the Mississippi River. The p;aintiff administratrix brought an action under the Jones Act for wrongful death against the Commission for the death of an employee who was trapped in the pilothouse of the Commission's Ferry as it sank after colliding with another boat. The district court found that the defendant-Commission was an agency of the States of Missouri and Tennessee and therefore immune from suit in tort under the eleventh amendment. The Supreme Court, per Justice Douglas, reversed the Eighth Circuit's decision, which had affirmed the decision of the district court. The Supreme Court held that, where the Commission's charter gave it the power to sue and be sued, the states which were parties to the charter compact had waived their immunity from suit. Id. at 789-90.

In Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964), an employee brought a personal injury action pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 et seq. (1972), against the Terminal Railway, which was owned and operated by the State of Alabama through its State Docks Department. The State of Alabama moved to dismiss the action on the ground that the Terminal Railway was an agency of the state and the state had not waived its sovereign immunity form suit. The district court granted the motion to dismiss, which decision the Fifth Circuit affirmed. On appeal, the Supreme Court, per Justice Brennan, reversed.

In an argument similar to that raised by the petitioner here (see Petition for Cerliorari at 10-11), the State of Alabama contended in Parden that the question of "whether a State has waived

its immunity depends upon its intention and is a question of State law." Id. at 194 (citations omitted). As Justice Brennan asserted, however:

> Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere---whether it be interstate compacts or interstate commerce---subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law.

Id. at 196.

The Court, after concluding that the State Docks was indisputably a common carrier by railroad engaging in interstate commerce, stated:

> Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A

State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to the regulation as fully as if it were a private person or corporation. Cf. South Carolina v. United States, 199 U.S. 437, 463; New York v. United States, 326 U.S. 572. It would surprise our citizens, we think, to learn that petitioners, who in terms of the language and purposes of the FELA are on precisely the same footing as other railroad workers, must be denied the benefit of the Act simply because the railroad for which they work happens to be owned and operated by a State rather than a private corporation. It would be even more

surprising to learn that the FELA does make the Terminal Railway "liable" to petitioners, but, unfortunately, provides no means by which that liability may be enforced. Moreover, such a result would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. See South Carolina v. United States, supra, 199 U.S., at 454-455. In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and

purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will.

Id. at 196-98 (footnotes omitted).

In Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), a foreign shipowner brought an action for damages under 28 U.S.C. § 1333 (1966), against a state agency for damages sustained when the ship struck a submerged, hurricane-damaged tower in navagable waters. The Fourth Circuit, pwr Judge Bryan, held that a suit under section 1333 could be brought against the State of Virginia because her entry into interstate and foreign commerce, that is, an exclusive federal province, amounted to a waiver of sovereign immunity. As the court stated after noting the State of Virginia's argument that it was immune from suit under the eleventh amendment:

Nevertheless, libellant's replication must prevail---the State obstacle and the

Constitutional impediment are both waivable and they have been disclaimed. Virginia relinquished both of these pleas by seeking and obtaining admission into an exclusive Federal realm---interstate and foreign commerce. Art.I, Sec. 8, U.S. Constitution. Necessarily, the State recognized that she built in the Bay only by sufferance of the Federal government. This acknowledgment is conclusively evidenced by her petition for permission pursuant to the act of Congress, 33 U.S.C. section 401 et seq., to occupy navigable waters with bridges and tunnels. The supplication of the State, and her reception into the Federal domain, meant surrender, pro tanto and pro tempore, of State sovereignty and submission to the paramount overlordship of the United States during the tenancy.

Id. at 1003.

In Cocherl v. State of Alaska, 246 F. Supp. 328 (D. Alaska 1965), the plaintiff, and injured seaman, brought an action for damages against the defendant, the State of Alaska, under the general maritime laws of the United States as well as the Jones Act. The plaintiff alleged that he had sustained the injuries while employed as a seaman on the vessel Taku, which was owned and operated by the State of Alaska as a common carrier in the navigable waters. The defendant answered, contending that it was immune from suit by virtue of the eleventh amendment. The court, relying upon the Supreme Court's decisions in Petty v. Tennessee-Missouri Bridge Commission, supra, and Parden v. Terminal Railway of Alabama State Docks Department, supra, held that the State of Alaska's operation of the vessel as a common carrier in interstate commerce on navigable waters constituted a waiver of its sovereign immunity and consent to a suit brought in federal court by

the plaintiff seaman under the Jones Act. This consent did not extend, however, to a claim based upon general maritime law on unseaworthiness. As Judge Plummer stated:

> The pdicy behind Parden is identical with the policy supporting the same result in the case at bar. This policy is the safety and efficiency of employees in interstate commerce based on the concern for the efficiency of interstate commerce itself.
>
> The factual situation, the construction of the Jones Act and the identity of policy behind a waiver of immunity under the Federal Employers' Liability Act and the Jones Act prompt the court to adopt as controlling in this case the rationale of the Supreme Court in its decision in Parden.
>
> The Jones Act passes on to seamen all the modifications and extensions of common law rights and remedies made under statutes of the United States dealing with

personal injuries to railway employees. The Arizona v. Anelich, 298 U.S. 110,56 S.Ct. 707, 80 L.Ed. 1075 (1936). It left untouched old admiralty remedies for injured seamen and added a cause of action sounding in negligence. Its literal language, and that of the Federal Employers' Liability Act incorporated into it, all indicate the Jones Act is a negligence statute and that damages may be recovered only for negligence.

. . .

While holding that respondent, by its actions, has consented to a suit under the Jones Act, the court concludes that this consent does not extend to a claim based on general maritime law in unseaworthiness.

Id. at 330 (citations omitted).

In the present case, the State of Louisiana and its Highway Department have entered into a sphere of federally-regulated activity, that is,

operation the ferry as a common carrier in navigable waters. As a result, the state and the highway department have surrendered or waived their rights of sovereign immunity under the eleventh amendment. As Justice Brennan noted in Parden v. Terminal Railway of Alabama State Docks Department, supra, it would be inequitable for the plaintiff to be barred form a remedy under the Jones Act "simply because the vessel for which he worked happens to be owned and operated by a State rather than a provate corporation. 377 U.S. at 197. As a result, under the cases cited and discussed above, the entry by the defendant into the federally-regulated area of navigation by common carrier should be deemed to be a waiver of its sovereign immunity.

In a well-reasoned dissenting opinion in Intercoastal Transportation, Judge Wisdom of the Fifth Circuit contended that the court should follow the Fourth Circuit's decision in

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, supra. Id. at 371. As Judge Wisdom stated:

> Applying this standard to the present case, I think it clear that Congress has lifted the states' veil of sovereign immunity. The Bridge Act of 1906, 33 U.S.C. § 491 et seq., establishes standards of care for the maintenance and operation of bridges over the navigable waters of the United States. In relevant part, it provides that draw bridges shall be opened promptly upon reasonable signal for the passage of boats or other watercraft, 33 U.S.C. § 494. The Act does not impose enormous fiscal burdens on the states as part of new pervasive scheme of federal regulation. Nor does it pose a threat to the harmony of our federal system by allowing recovery of double damages or invading an area traditionally reserved to

> the states . . . .The paramount purposes behind the Act demand that the states, who typically own the bridges involved, be made amenable to suits for enforcement of the statutory standards. This is true regardless whether the plaintiff is the United States or a private party injured by the violation of a statutory provision designed to protect him. Thus, there is no reason to presume that Congress did not intend to lift the states' immunity in all cases.

Id. at 370.

Under these circumstances, Judge Wisdom concluded:

> I would conclude, therefore, that the plaintiff's suit is not barred by sovereign immunity. The majority would require express statutory language that private enforcement remedies are applicable in suits against the states. To me, however, such a

> rule in contrary to the case law, to common sense, and to the usual presumption that whem Congress acts it is deemed to exercise its power to its utmost extent. Under the commerce clause, Congress had the authority to enact the present legislation. For the reasons previously stated, the Act should be construed as applying to private enforcement suits against the states. As the majority acknowledges, Georgia, by entering a federally regulated sphere of activity. waived whatever immunity it had at common law or under the eleventh amendment. There the matter should end.

Id.

One argument available to counsel in view of the foregoing is that the cases cited by Petitioner are not applicable to the present case on public policy ground. As Justice Stone stated with regard to the Jones Act:

> The legislation was remedial, for the benefit and protection of seamen who are peculiarly the ward of admiralty. Its purpose was to enlarge that protection, not to narrow it . . . . Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, ...

The Arizona v. Anelich, 298 U.S. 110, 123, rehearing denied, 298 U.S. 692 (1936) (citation omitted). By virtue of the Jones Act, Congress extended to seamen the remedies made available to railroad workers under the Federal Employers' Act. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). Accordingly, the Supreme Court's decision in Parden v. Terminal Railway of Alabama State Docks Department, supra, FELA case, is persuasive in the present case, as is Cocherl v. State of Alaska, supra, a Jones Act case, which held, in effect, that the employee plaintiff's right to sue the defendant state

under those statutes was of greater significance than the state's claim of sovereign immunity under the circumstances. Moreover, the federal circuit court cases cited above, see Williamson Towing Co., Inc. v. State of Illinois, supra; Intercoastal Transportation, Inc. v. Decatur County, Georgia, supra; and Red Star Towing & Transportation Co. v. Department of Transportation of New Jersey, supra, did not involve the FELA or the Jones Act. As a result, those cases lacked public policy reasons for upholding the plaintiff's right to maintain his cause of action. Here, such public policy factors are present and should be persuasive.

The Court must be aware of the fact that Usry v. Louisiana Department of Highways, 459 F. Supp. 56 (E.D. La. 1978) did not involve the issue of waiver of immunity with respect to a particular action. It is Respondents position that the Petitioners waived its Eleventh Amendment immunity as to this particular suit.

The Supreme Court in Edelman v. Jordan, 415 U.S. 651, 673, granting Murray v. Wilson Distilling Co., 213 U.S. 151, 171,29 S.C.T. 458, 464, 53 L. Ed. 742 (1909), stated:

> In deciding whether a State has waived its Constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Since the decistion in Edelman, several of the federal courts have rendered decisions that held that actions by representations of a state may constitute an effective waiver of the Eleventh Amendmant immunity with respect to a particular case. see Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974) Gallagher v. Continental Insurance Company, 502 F.2d 827 (10th Cir. 1974) and Vargas v. Tainor, 508 F.2d 485 (7th Cir. 1974) cert. den., 420 U.S. 1008, 95 S. Ct. 1454, 43 L. Ed. 2d 767.

There is no state statute or constitutional provision known to the Respondent that would permit or deny the attorney for the state the right to waiver the State's immunity under the Eleventh Amendment. There is, however, in Louisiana law a very strong presumption that an attorney acts with the authority of his client. see Gaudet v. Lawes, 166 So.2d 337 (La. App. 1964). Respondent can see no reason for applying a different rule because an attorney represents the State.

The question of waiver of suit by one against the State in any other court has not been answered by the Louisiana State Courts, and the answer to why is obvious, but the question of waivering a jury trial under R.S. 13:5105 has been answered and in those cases the courts have held that when a state agency or political subdivision protected from a jury trial by R.S. 13:5105 proceeds to trial by jury, the right to object to jury trial is waived. Simmons v. Beauregard Parish School

Board, 315 So2d 883 (La. App. 1975) writ refused 320 So.2d 207 (1975). Callahan v. Town of Bunkie, 287 So.2d 629 (La. App. 1973).

CONCLUSION

Respondent respectfully prays that this Honorable Court deny the Writ of Certiorari to review the Judgment of the Fifth Circuit Court of Appeals.

Respondent subsits that the Department of Highways did and has waived its immunity provided by the Eleventh Amendment of the United States Constitution and thus the judgments of the Lower Court should be affirmed. It is further submitted that the Lower Courts had jurisdiction due to the fact that the State of Louisisna via the Louisiana Department of Highways was and does operate ferry boats in nabigable waters, the Petitioners have entered a federally-regulated sphere of activity and accordingly the Petitioners have waived their sovereign immunity rights and is, therefore, subject to the Respondent's Jones Act action in federal court.

Additionally, Respondent submits that the judgments of the Lower Courts with reference to the statute of Mr. Crador as a Jones Act seaman be affirmed and that no judgment be amended, reversed or remanded because of any evidenturary question related to Mr. Crador's work history, but that the judgments of all the Lower Courts be affirmed in toto.

Respectfully submitted,

BILLY H. EZELL
Post Office Drawer 1580
1039 Common Street
Lake Charles, LA 70602

Attorney of record for
Winnie Ola Crador as
Executrix of the Estate
of Hurby Crador, Etc.

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared:

BILLY H. EZELL

who declared unto me, Notary, that he is the attorney for Plaintiff-Respondent herein and has applied for membership to the Bar of the Supreme Court of the United States, and hereby certified that on the _____ day of May, 1981, he served copies of the foregoing Petition for Certiorari on Defendant-Petitioners through their attorneys of record and on the Clerk of Court, United States Court of Appeals for the Fifth Circuit and the Clerk of the Supreme Court of the United States by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows:

HEBERT & ABBOT

Andre' J. Mouledoux

Maurice C. Hebert, Jr.

666 Poydras Street, Suite 500

New Orleans, Louisiana 70130

RONALD R. THOMPSON

6161 Perkin Road, Suite 2B

Baton Rouge, Louisiana 70808

CLERK OF COURT

FIFTH CIRCUIT COURT OF APPEALS

600 Camp Street

New Orleans, Louisiana 70130

CLERK OF COURT

SUPREME COURT OF THE UNITED STATES

One First Street N.E.

Washington, D.C. 20543

BILLY H. EZELL

SWORN TO AND SUBSCRIBED before me, this _____ day of May, 1981.

_____
NOTARY PUBLIC

APPENDIX A

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway emp;oyees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall

be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX B

33 U.S.C. § 905(b) Navigation and navigable waters

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damaged by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the emp;oyer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to

provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

As amended Oct. 27, 1972, Pub.L.92-576, § 18(a), 86 Stat. 1263.